IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KAYVION JACKSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 88147-COA

ORDER OF AFFIRMANCE

Kayvion Jackson appeals from a judgment of conviction, entered pursuant to a jury verdict, of two counts of burglary of a business and one count each of conspiracy to commit robbery, robbery, attempted robbery, burglary of a business while in possession of a deadly weapon, robbery with the use of a deadly weapon, and attempted robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Jackson argues there was insufficient evidence presented at trial that he participated in the crimes. Jackson contends he was merely present at two of the three crime scenes and there was no physical evidence connecting him to the weapons used or the stolen items. When reviewing a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution and determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *accord Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). "[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." *Walker v. State*, 91 Nev. 724, 726, 542

P.2d 438, 439 (1975). And circumstantial evidence is enough to support a conviction. *Washington v. State*, 132 Nev. 655, 662, 376 P.3d 802, 807 (2016). One's presence, "together with other circumstances," may support an inference that one is a party to an offense and not merely present. *Winston v. Sheriff*, 92 Nev. 616, 618, 555 P.2d 1234, 1235 (1976).

Jackson was charged with crimes arising from the armed robbery of three pawn shops, where the suspects wore masks and gloves to conceal their identities. Authorities identified and arrested five suspects in connection with the robberies: A. Doss, L. Bingham, S. Wiley, A. Huston, and Jackson. Jackson and Huston were tried together. During trial, surveillance video footage related to the robberies was admitted into evidence and played for the jury. We initially note that Jackson did not include the surveillance video footage in the record on appeal. *See* NRAP 10(a) (stating that "[t]he district court record consists of the papers and exhibits filed in the district court"); NRAP 10(b)(1) (providing that the parties shall include in an appendix "the portions of the district court record to be used on appeal"); *see also* NRAP 10(b)(2) (stating that "[i]f exhibits cannot be copied to be included in the appendix the parties may request transmittal of the original exhibits"). And because it is the appellant's burden to ensure that a proper appellate record is prepared, *see Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980), we necessarily presume that the missing surveillance video footage supports the jury's verdict, *cf. Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

In addition to viewing the surveillance video footage, the jury heard testimony from a pawn shop employee present during the third robbery that one of the assailants remained behind at the counter to grab

more jewelry after the others left. The employee heard someone call out "A.J., let's go." Detective Prior testified that during his interview with Jackson, Jackson initially denied any involvement in the robberies. However, Jackson told Prior during the interview he goes by "K.J." and eventually told Prior that he had been at the third robbery but only held the door. Prior asked Jackson if "K.J." had been called out during the third robbery, and Jackson acknowledged that this had occurred. Prior further explained that he believed Bingham was the person who held the door during the robberies. Jackson also admitted he was present at the first robbery,[1] and his cellphone was near the location of the second robbery at the time it occurred. Approximately 30 minutes before the second robbery, a phone call took place between Jackson and Huston's cell phones. And after the third robbery, Bingham messaged Jackson asking where the rest of the money was. Considering the evidence presented in the light most favorable to the State, any rational juror could have found beyond a reasonable doubt that Jackson participated in the crimes. We thus conclude Jackson is not entitled to relief based on this claim.

Jackson also argues the district court failed to sua sponte give a mere presence jury instruction.[2] "Failure to object to or request a jury

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[1]Despite his admissions in the interview to being present at the first and third robberies, other than his statement that he only held the door during the third robbery, Jackson does not point to any evidence in the record that demonstrates which of the masked persons he was or his role, or lack thereof, in the crimes.

[2]Jackson proffers on appeal the following instruction approved by the Nevada Supreme Court:

> Mere presence at the scene of the crime and knowledge that a crime is being committed are not

instruction precludes appellate review, unless the error is patently prejudicial and requires the court to act sua sponte to protect the defendant's right to a fair trial." *McKenna v. State*, 114 Nev. 1044, 1052, 968 P.2d 739, 745 (1998). This court must analyze the need for an instruction in light of the circumstances of the case. *Bowman v. State*, 132 Nev. 757, 764, 387 P.3d 202, 207 (2016). "The test for the necessity of instructing the jury is whether there is any foundation in the record for the defense theory." *Allen v. State*, 97 Nev. 394, 398, 632 P.2d 1153, 1155 (1981). However, a district court need not give a jury instruction on the defendant's theory of the case if the instruction "is adequately covered by other instructions." *Barron v. State*, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989).

Here, we conclude Jackson's theory of the case was substantially covered by the other instructions. The instructions required the State to prove each element of the crimes beyond a reasonable doubt, which included proving that Jackson acted with the requisite intent to commit the crimes. Further, the jury was instructed that aiding and abetting a crime requires proof that the person "either directly and actively commit[ed] the act" or "advise[d] and encourage[d] its commission, with the intent that the crime be committed." The jury was also instructed that "[e]vidence that a person was in the company or associated with one or more other persons alleged or proven to have been members of the conspiracy is

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> sufficient to establish that the defendant aided and abetted the crime, unless you find beyond a reasonable doubt that the defendant is a participant and not merely a knowing spectator.

Brooks v. State, 103 Nev. 611, 613, 747 P.2d 893, 894 (1987) (citing *Winston*, 92 Nev. at 618, 555 P.2d at 1235).

not, in itself, sufficient to prove that such person was a member of the alleged conspiracy." Therefore, we conclude Jackson fails to demonstrate a patently prejudicial error requiring the district court to sua sponte give a jury instruction on mere presence.

Finally, Jackson argues that the doctrine of cumulative error mandates reversal. Although "[t]he cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually," *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002), Jackson has not demonstrated any errors to cumulate. Therefore, he is not entitled to relief on this claim. *See Chaparro v. State*, 137 Nev. 665, 673-74, 497 P.3d 1187, 1195 (2021) (holding a claim of cumulative error lacked merit where there were no errors to cumulate); *see also United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). For these reasons, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Michelle Leavitt, District Judge
Attorney General/Carson City
Clark County District Attorney
Law Office of Jean J. Schwartzer, Ltd.
Eighth District Court Clerk